(2)

No. 95-6



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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NORFOLK & WESTERN RAILWAY COMPANY,
*Petitioner,*

v.

WILLIAM J. HILES,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether a railroad car on which the drawbar is so misaligned as to prevent automatic coupling violates Section 2 of the Safety Appliance Act (49 U.S.C. § 20302 (a)(1)(A)).

## LIST OF ALL PARTIES & RULE 29.1 LIST

The only parties to this proceeding are the:

Petitioner: Norfolk & Western Railway Company

Respondent: William J. Hiles

The Petitioner Norfolk & Western Railway Company is a subsidiary of the Norfolk Southern Corporation.

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## REASONS FOR DENYING THE PETITION

### I. THIS CASE DOES NOT PRESENT A MAJOR SAFETY ISSUE

The Petitioner depicts this litigation as one having a major safety impact in the rail industry. We agree that the case involves a disputed interpretation of the Safety Appliance Acts ("SAA" or "Act"), but it impacts very few accidents or incidents. In 1993, based on the most recent published FRA statistics, only 6 employees were injured in the railroad industry while adjusting a coupler, and there was one death.[1] During the same time period

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[1] Source: Accident/Incident Bulletin No. 162, Calendar Year 1993, U.S. Dept. of Transportation, Tables 66 and 67. (June 1994). There was one unrelated additional injury resulting from a coupler drawhead broken or defective, which did not involve a coupling or uncoupling procedure. *Id.*, Table 63.

there were a total of 15,363 injuries to railroad employees on duty, and 47 killed.[2] When the law was passed in 1893, there were 9,063 coupling casualties. In each casualty in 1993 there was movement of cars which occurred while the employee was attempting to adjust the coupler. In this case no movement of cars occurred. The undersigned presumes at least some of these 7 casualties resulted from defective couplers. Therefore, only a very few cases would ever have this issue brought before a court. While each injury and death is significant, certainly to the persons involved, casualties from adjusting couplers are not a major nationwide concern.

## II. THE SAA WAS CORRECTLY INTERPRETED BY THE LOWER COURT

The petitioners argue that the plaintiff in a SAA case must prove that an actual defect exists before there can be a violation.[3] That analysis is inaccurate by a plain reading of the statute, its intent, and the legislative history.

A. The words of the SAA do not state that the coupler must be defective in order for there to be a violation. This conclusion was reached by the Court in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1949). If the couplers do not couple automatically by impact (for whatever reason whether defective or not) or cannot be uncoupled without the necessity of men going between the ends of cars, then the SAA is violated. By comparison, Congress in the Locomotive Boiler Inspection Act, originally enacted in 1911 at 45 U.S.C. §§ 22-34 specifically required that the locomotive be "in proper condition and safe to operate" (45 U.S.C. § 23). The codified provision carries forward the same phraseology. (49 U.S.C. § 20701(1)).[4] When adopting the LBIA Congress was

[2] *Id.*, Table 9.

[3] The SAA was originally codified at 45 U.S.C. §§ 1-16.

[4] The SAA and LBIA are the two basic substantive statutes covering freight cars and locomotives.



certainly aware of its different language used in the SAA. In the SAA Congress did not require that the couplers be defective. Rather, they must couple and uncouple automatically whether defective or not. However, in the LBIA the locomotive has to be in proper condition and safe to operate.

B. The Court stresses the importance of statutory policy. See *Bruce Babbitt, et al. v. Sweet Home Chapter of Communities For A Great Oregon, et al.*, 63 U.S.L.W. 4665, 4668 (June 27, 1995). A host of cases have made it clear that the prime purpose of the SAA is the protection of employees from injury or death. See *B. & O. R.R. v. Jackson*, 353 U.S. 325 (1957); *Gentle v. Western & A. R.R.*, 305 U.S. 654 (1939); *San Antonio, etc. R.R. v. Wagner*, 166 S.W. 24, *aff'd*, 241 U.S. 476, 484 (1916); *Southern Pacific v. Mahl*, 406 F.2d 1201, 1203 (5th Cir. 1969); *Buskirk v. Burlington Northern*, 431 N.E. 2d 410, 412 (Ill. 1982), *cert. denied*, 459 U.S. 910; *McGee v. Burlington Northern*, 571 P. 2d 784 (Mont. 1977); *Henwood v. Gary*, 196 S.W. 2d 958 (Tex. 1946); *Crabtree v. Kurn*, 173 S.W. 2d 851 (Mo. 1943); *Tipton v. Atchison, Topeka & Santa Fe, R.R.*, 78 F.2d 450 (9th Cir. 1935), *aff'd*, 298 U.S. 141 (1936); *Pry v. Alton & Southern R.R.*, 598 N.E. 2d 484, 500 (Ill. 1992). The object of the SAA, being remedial and humanitarian, should not be construed as to defeat the above purpose. This certainly would result if the Petitioner's views were adopted.

C. The legislative history fortifies the statutory provision that it is not necessary to prove a defect for a violation of the SAA to occur. Congress in the automatic coupler provision wanted one result—to obviate the necessity of men going between cars. H.R. Rep. 1678, 52nd Cong., 1st Sess. 3 (1892). There is not one word in the report, nor the Congressional floor debate, to the effect that the coupler must be defective before a violation exists. The Petitioner undertakes a selective analysis into the legis-

lative history in which it ignores the central policy expressed throughout the SAA—to protect the worker.

It is a seminal rule of statutory construction that "[i]n construing any congressional enactment it is necessary to interpret the meaning of the words as they are used in relation to the setting in which they were written, with due regard to the mischief which the legislation was designed to remedy." *Scott v. Moore*, 640 F.2d 708, 727 (5th Cir. 1981); See, *Kokoszka v. Belford*, 417 U.S. 642 (1974); *reh. denied*, 419 U.S. 886 (1974).

Congress was certainly cognizant of the problem and wanted to eliminate the possibility of casualties resulting from persons placing themselves between ends of cars. The following exchange between the author of the bill which became 45 U.S.C. § 2 [5] and the Chairman of the Interstate Commerce Committee in the Senate hearings illustrates this concern:

> The CHAIRMAN. Suppose your bill, Senate bill 1618, were passed and becomes a law. Will there be, under any circumstances, any necessity for a switchman *to go between the cars at all* in order to couple or uncouple the cars?
>
> Mr. RODGERS. . . . The law provides that there shall not be. They have to adopt a coupler with such details that it will not. . . .
>
> . . . .
>
> There is a number of devices that enable this uncoupling to take place from the *side of the car*, and it is better that it should be. (Emphasis Added).

S. Rep. No. 1049, 52d Cong., 1st Sess. 15 (1893).[6]

Congress determined that language prohibiting going between cars was necessary above and beyond the requirement that all cars be equipped with automatic coupling devices.

[5] Currently codified at 49 U.S.C. § 20302(a)(1)(A).

[6] The Senate hearings were annexed as part of the Senate Report.



Congress was concerned about the hazards of going between the ends of the cars to effect coupling or uncoupling even with the already-in-use automatic coupling systems. It is for that reason that the enactment of 45 U.S.C. § 2 contained not only a requirement that cars be equipped with automatic couplers, but also a prohibition against going between cars even so equipped. Even the industry spokesperson acknowledged that the intent of the legislation was to protect the worker from personal injury. The interpretation taken in recent years by the railroads and in this litigation is different from what the industry represented to Congress.

Mr. Haines, Vice-president of the American Railway Association (predecessor to the Association of American Railroads) stated the problem succinctly in testimony during the 1892 hearings:

> . . . I understand the tendency of the legislation to be of a most laudable character and one in which we are a most laudable character and one in which we are entirely in accord, and that is that this committee desires to consider the proposed bills before them with reference to the safety of the men who use these couplers. That is the aspect of the case to which I propose to refer—the possibilities of legislation. It is not a question as to whether we should have a uniform coupler or not. *The question is whether we shall have that kind of coupler which will protect men's lives and protect them from personal injury, and that is the yardstick that is to be applied to all proposed legislation.* (Emphasis Added).

S. Rep. No. 1678, *supra* at 40.

As Mr. Haines further testified:

> What we all want . . . and what this committee wants is a coupler which can be used without danger to the life or to the limb of the man who manipulates it.
>
> . . . .

> What the man who manipulates the coupler wants is that every coupler . . . shall have what we call the release rod, that controls the locking device, so arranged that he can stand *outside* of that car and operate it. *Id.* (Emphasis Added).

The couplers today are engineered significantly better than existed in 1893 when the SAA was enacted. Congress at the time was interested in eradicating the loss of life and injuries resulting not only from defective couplers, but couplers failing to couple automatically for any reason. This is the only way employees would be fully protected and certainly what Congress intended. To carve out an exception to the protection of employees 102 years later we submit would be unconscionable.

## III. THE CONFLICTS IN THE COURTS ARE NOT SIGNIFICANT

The Respondent acknowledges that there is a conflict between various courts on the issue regarding the need to prove that a defect exists under the automatic coupler provision of the SAA. We submit that fact alone does not justify granting certiorari here. As pointed out earlier, based on the latest available figures, only six employees were injured in 1993 as a result of coupling or uncoupling.

The Court has reviewed § 2 of the SAA a limited number of times. In each case it upheld the basic purpose of the Act to protect an employee from having to go between cars to assist in coupling or uncoupling. However, the Court has never specifically addressed the issue of whether a misaligned drawbar which causes the railroad car not to couple is a violation of § 2 of the SAA.

In *Affolder v. New York, Chicago & St. Louis R.R., supra,* the Court held that a car which failed to perform properly in a switching operation was a violation of the Act. 339 U.S. at 99. The only condition upon which a carrier could avoid liability is if the coupler had not



been properly opened. *Id.* The Court pointed out that the plaintiff did not have to show a *bad* condition of the coupler. 339 U.S. at 98. In *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430 (1949), the Court held that the absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple. 338 U.S. at 433-434. The Court said:

> This Court has repeatedly attempted to make clear that this is an absolute duty unrelated to negligence, and that the absence of a 'defect' cannot aid the railroad if the coupler was properly set. *Id.*

In *Atlantic City R.R. v. Parker,* 242 U.S. 56 (1916), an employee was injured while straightening a drawbar.[7] There the Court said that:

> [i]f couplers failed to couple automatically upon a straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law. *Id.* at 59.

In *Johnson v. Southern Pacific R.R.*, 196 U.S. 1 (1904), a plaintiff in the process of straightening a drawbar was injured because the couplers on the two cars to be joined were not compatible with one another. The Court made it clear that the concluding phrase in Section 2 applies to both coupling and uncoupling.

Furthermore, recognition of the split in various courts will likely prompt most attorneys to allege additionally a separate count under FELA that the railroad failed to provide a safe place to work, irrespective of the SAA. This would further minimize the need for the Court to accept certiorari.

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[7] *San Antonio & A.P. R.R. v. Wagner,* 241 U.S. 476 (1916) is inapposite to the present case because in *Wagner* there was evidence of defective equipment. See also *O'Donnell v. Elgin, J. & E. R.R.*, 338 U.S. 384 (1949).

If a significant safety problem develops, Congress is the appropriate vehicle for amending this section of the law.

## CONCLUSION

For all the reasons stated herein, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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